2008

Utah Department of Transportation v. Admiral Beverage Corporation : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

UTAH DEPARTMENT OF TRANSPORTATION,	:	
Plaintiff/Appellee,	:	
v.	:	Case No. 20080027-CA
ADMIRAL BEVERAGE CORPORATION,	:	
Defendant/Appellant	:	

BRIEF OF PLAINTIFF/APPELLEE

Appeal from the Judgment of the Third Judicial District Court, Salt Lake County,
Judge Robert P. Faust

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ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED BY PLAINTIFF/APPELLEE

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LIST OF ALL PARTIES

To the best of Plaintiff's/Appellee's knowledge, all interested parties appear in the caption of this Brief.

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BRIEF OF PLAINTIFF/APPELLEE

STATEMENT OF JURISDICTION

Defendant filed its petition for an interlocutory appeal on January 16, 2008. R. 875. This action came within the original jurisdiction of the Utah Supreme Court under Utah Code Ann. § 78A-3-102(3)(j) (Laws 2008, c. 3). On January 17, 2008, the Utah Supreme Court transferred this action to this Court pursuant to Rule 42(a) of the Utah Rules of Appellate Procedure. R. 877. On January 30, 2008, this Court granted the defendant's petition as to "[w]hether the trial court erred in excluding evidence of severance damages based on loss of view from the remaining property." R. 895.

STATEMENT OF THE ISSUES

1. Defendant's property abuts 500 West, a street owned by Salt Lake City. I-15 is on the far side of 500 West from the defendant's property. Admiral Beverage sought to introduce evidence of damage to its property based upon an alleged loss of view because

of the reconstruction of I-15. This claim involves an easement appurtenant that is connected only to the roadway that abuts the property. The district court correctly ruled that defendant was only entitled to such damages as related to the adjacent roadway (500 West) and not I-15.

ISSUE PRESERVED BELOW. This issue was raised by the Utah Department of Transportation (UDOT) below in a motion in limine. R. 727-35. The district court considered this motion and granted it for this reason. R. 863.

STANDARD OF REVIEW: Where a motion in limine is granted based on the district court's legal conclusions, the decision is reviewed for correctness. UDOT v. Ivers, 2005 UT App 519, ¶9, 128 P.3d 74, aff'd in part and remanded, Ivers v. UDOT, 2007 UT 19, 154 P.3d 802.

2. The district court excluded Admiral Beverage's evidence of severance damages because it included claims for loss of visibility. Defendant was not entitled to present such evidence because no such compensable right exists under Utah law. The district court properly excluded this evidence.

ISSUE PRESERVED BELOW. UDOT raised this issue in two motions in limine. R. 151-63, 656-64. These motions were considered by the district court and granted. R. 495-98, 862-64.

STANDARD OF REVIEW: The standard is the same as for the first issue.

3. The district court did not abuse its discretion when it adopted a prior judge's decision instead of overturning it as urged by Admiral Beverage.

ISSUE PRESERVED BELOW. Admiral Beverage raised this question in opposition to *UDOT*'s motion in limine. R. 767-69.

STANDARD OF REVIEW: It is within the sound discretion of the district court to decide whether or not it will reconsider an issue already ruled upon. IHC Health Serv. Inc. v. D & K Mgmt., Inc., 2008 UT 36, ¶27, 606 Utah Adv. Rep. 28.

DETERMINATIVE STATUTES AND RULES

There are no such provisions.

STATEMENT OF THE CASE

UDOT brought condemnation proceedings against two adjacent pieces of property in the summer of 1997. UDOT did not seek ownership of the entire parcels of land, but only portions thereof.[1] Admiral Beverage owned one of the properties and purchased the other. R. 72-75 in Case No. 970905361. On July 14, 1999, the district court consolidated these actions under Case No. 970905361. R. 98-99 in Case No. 970905361; R. 63-64 in Case No. 970905368.[2]

In January 2005 UDOT filed a motion in limine, asking that the defendant be precluded from presenting evidence at trial of severance damages caused by a loss of visibility into the noncondemned portions of the property.[3] R. 151-63. Admiral Beverage

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[1] UDOT v. Mark Inv. Corp., Case No. 970905361 (R. 11-20) and UDOT v. Admiral Beverage Corp., Case No. 970905368 (R. 1-10).

[2] All further references to the record are to Case No. 970905361.

[3] The loss of visibility damages were allegedly caused by UDOT's construction and modification of the freeway that restricted the remaining property's visibility to

filed a motion in limine asking the court to allow several types of severance damage evidence, including that caused by loss of visibility and loss of view. R. 168-409. In its Memorandum Decision and Order of October 31, 2005, the court granted UDOT's motion and denied Admiral Beverage's motion. R. 492-502. The court concluded that no claim for loss of visibility from a freeway existed. R. 495-98.

In May 2006 the district court certified this order as being final pursuant to Utah R. Civ. P. 54(b). R. 520-26. Admiral Beverage filed its appeal on May 8, 2006. R. 527-44. On August 11, 2006, this Court dismissed that appeal without prejudice because the district court's order was not eligible for certification as final under Rule 54(b). R. 556-59.

In August and October of 2007 UDOT filed further motions in limine. R. 656-64, 727-35. These motions challenged Admiral Beverage's intent to use evidence of damages related to its loss of visibility into its property from I-15. The motions also asked the district court to exclude any severance damages claimed to be caused by changes to a road or freeway that was not abutting the defendant's property. In opposing these motions, defendant claimed that it should be permitted to present evidence of damages arising from alleged loss of view out of the remaining property and for loss of visibility of the remaining property from I-15. R. 669-84, 757-75

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travelers on I-15. R. 152-53.

In its minute entry of December 27, 2007, the district court granted UDOT's motions. R. 862-67. Defendant filed its petition for an interlocutory appeal on January 16, 2008. R. 875. This action came within the original jurisdiction of the Utah Supreme Court under Utah Code Ann. § 78A-3-102(3)(j) (Laws 2008, c. 3). On January 17, 2008, the Utah Supreme Court transferred this action to this Court pursuant to Rule 42(a) of the Utah Rules of Appellate Procedure. R. 877. On January 30, 2008, this Court granted the defendant's petition as to "[w]hether the trial court erred in excluding evidence of severance damages based on loss of view from the remaining property." R. 895.

STATEMENT OF RELEVANT FACTS

The facts concerning the location of Admiral Beverage's property and how it relates to I-15 are taken from Judge Roth's Memorandum Decision and Order of October 31, 2005. R. 492-502. The district court found that the facts were not "disputed in any material way." R. 493. Plaintiff has not claimed in its opening brief that there was a material issue of fact.

Admiral Beverage owns two adjacent lots that are west of I-15 in Salt Lake County. The property abuts the west side of 500 West, which acts as a frontage road in that area. 500 West runs between Admiral Beverage's property and I-15. R. 664 (map of Admiral Beverage's property showing its relationship with I-15 and the portions to be condemned - a copy is attached as Addendum C).

> In connection with the I-15 reconstruction project, the west side of the freeway in that area was moved closer to the Admiral lots, requiring that the 500 West frontage road also be moved further to the west and onto the east

> side of Admiral's property, resulting in the condemnation of what are now identified as parcels 109 and 110, which are the subject of these consolidated cases.

R. 493.

The parcels of land taken from Admiral Beverage for the project were used for the reconstruction of 500 West. None of it was used for the remodeled I-15. R. 494. While not mentioned by Judge Roth, it is undisputed that both before and after the reconstruction of I-15 access to Admiral Beverage's property was gained by use of 500 West. R. 657.

In this appeal, Admiral Beverage challenges the district court's orders granting UDOT's three motions in limine. UDOT's first motion asked that the defendant be precluded from presenting evidence at trial of severance damages caused by a loss of visibility into the noncondemned portions of the property from I-15. R. 151-63. UDOT's second motion challenged the appraisal prepared by Jerry Webber because it included the same loss-of-visibility damages excluded by the district court's prior order. R. 727-35. Defendant acknowledges that Mr. Webber said he was unable to separate damages caused from loss of view (out) from damages caused by loss of visibility (in). R. 774; Opening Brief of Defendant at 4-6, 13-16. UDOT's third motion asked that severance damages claimed to be caused by changes to a road or freeway that was not abutting the defendant's property be excluded. R. 656-64.

SUMMARY OF ARGUMENT

Admiral Beverage sought to introduce evidence that the value of its property had been diminished due to the loss of view and visibility caused by the reconstruction of I-15. But defendant's property is not adjacent to I-15. The land is on the west side of 500 West, which it abuts, while I-15 is to the east of 500 West. The appurtenant easement of view attaches to the abutting roadway (500 West), not to other property or roadways.

The Utah Supreme Court has expressly held that Utah does not recognize a damage claim based on a property's loss of visibility from a roadway. Defendant sought to circumvent this decision by seeking damages for loss of visibility as part of a single sum including other claims, not as a separate claim for damages. The district court correctly rejected this effort.

Nor should Judge Faust's decision on two motions in limine be reversed simply because he adopted a prior decision issued by Judge Roth. While a second judge can reconsider a prior judge's decisions in the proper circumstances, there is no duty to do so.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY LIMITED DEFENDANT'S EASEMENT FOR VIEW TO THE ABUTTING PUBLIC ROAD - 500 WEST

Admiral Beverage's claims for severance damages for loss of view and visibility related to the reconstruction of I-15. Loss of view damages are caused by obstructions that block the view out from that portion of the property that was not condemned. Loss of

visibility damages are caused by obstructions that block the view into the noncondemned portion of the property from a roadway or highway.

It is undisputed that the defendant's property was not adjacent to I-15. Defendant's property is divided and separated from I-15 by 500 West, a street owned by Salt Lake City. This physical condition existed both before and after the I-15 reconstruction. The district court correctly held that defendant could not claim damages for loss of view caused by changes made to a public road that his property did not abut.

Utah has long recognized that an owner of land adjacent to a public road enjoys a right of easement of access, air, light, and view to the public road. In Dooly Block v. Salt Lake Rapid Transit, 33 P. 229, 231 (Utah 1893), the court explained that property owners adjacent to a public street had the right of access to the street "subject only to the ordinary use of the same for the purposes of public travel, and that they are entitled to the use of said street, free from unreasonable obstructions, as a means of access, light, and air to their premises."

The appurtenant rights of air, light, and view discussed in Dooly Block and Utah State Road Commission v. Miya, 526 P.2d 926 (Utah 1974) are companion to, and derivative of, the easement for physical access. "The rights of access, light, and air are easements appurtenant to the land of an abutting owner on a street; they constitute property rights forming part of the owner's estate." Miya, 526 P.2d at 928.[4] As such,

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[4] "An owner of land abutting on a street is also in possession of an easement of view, which constitutes a property right which may not be taken without just

they create no right greater than the right to physical access. They consist of the right to use the public street for access, light, air and view. They impose no greater burden on the public right of way than the servitude necessary to provide the right of access.

This right of access is properly described as a right appurtenant to property that is adjacent to public streets. An appurtenant easement is defined as "[a]n incorporeal right which is attached to a superior right and inheres in land to which it is attached and is in the nature of a covenant running with the land. There must be a dominant estate and servient estate." Black's Law Dictionary 457 (5th ed. 1979) (citations omitted).

> An easement appurtenant . . . is a privilege which the owner of one tenement has the right to enjoy, in respect to that tenement in or over the tenement of another person.

Dansie v. Hi-Country Estates, 2004 UT App 149, ¶11, 92 P.3d 162.

The location of the servitude is at the property boundary adjacent to the public right of way. The right does not pass onto the public right of way or cross out the other side. Neither does it travel laterally up and down the highway. The right does not extend across the adjacent roadway to burden private and public property on the other side of the public street to guarantee a view over such property. Utah's courts have regularly described the right as one of reasonable access to and from the property to use the public road.

> The interest protected simply entails the "right of ingress and egress to and from . . . property and the abutting public highway." Harvey's property may

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compensation." Id. at 929.

> be accessed through both the new frontage road and Old Mountain Road; consequently, its right of access has not been denied. The right does not extend so far as to guarantee a property owner that his property will be accessed through specific intersections or that the roads accessing his property will be easily accessed from other thoroughfares.

State v. Harvey Real Estate, 2002 UT 107, ¶14, 57 P.3d 1088 (citation omitted).

This approach to the rights appurtenant is also incorporated into Utah Code Ann. § 72-1-102(11) (West 2004), which defines a limited-access facility as

> a highway especially designated for through traffic, and over, from, or to which neither owners nor occupants of abutting lands nor other persons have any right or easement, or have only a limited right or easement of access, light, air, or view.

The courts of other states have also followed the general rule that a landowner does not have appurtenant easements over the property of their neighbors. These easements only apply to the public road that abuts their property.

> As a general matter, a landowner cannot recover from a neighboring landowner simply because he dislikes the use to which the second landowner put his property. Thus, a landowner could not recover from his neighbor just because the other had erected a building on his own property which blocked the view from the first owner's land, or the visibility of the first owner's land. The only way to prevent a neighbor from constructing a building which would block one's view is to buy an easement of view. The logical implication of this position is that a property owner has no right to an unobstructed line of vision to his property from anywhere off of his property, absent an easement of some sort.

8,960 Square Feet v. State, 806 P.2d 843, 845-46 (Alaska 1991) (citation and footnotes omitted). See also Collinson v. John L. Scott, Inc., 778 P.2d 534, 537 (Wash. App. 1989) ("The general rule appears to be that a building or structure cannot be complained of as a nuisance merely because it obstructs the view of neighboring property.").

It is undisputed that Admiral Beverage's property was not adjacent to I-15. It has at all times abutted 500 West, not the freeway. The freeway was built, and remains today, on property found on the far side of 500 West from the defendant's land. Defendant's appurtenant easements pertain to 500 West and not to I-15. Judge Faust's decision correctly took this fact into consideration. "Defendant is able to assert claims for any severance damages relating to abutment rights pertaining to being an adjoining landowner to 500 West." R. 863. The district court correctly applied Utah law and should be affirmed.

On appeal, the defendant does not directly address this issue. Instead, Admiral Beverage relies solely on Ivers v. Utah Dep't of Transp., 2007 UT 19, 154 P.3d 802. Defendant correctly notes that the Utah Supreme Court held that damages caused by a loss of the appurtenant easement of view can be claimed, in appropriate circumstances, whether or not the obstruction was actually built on the condemned portion of the property. Ivers, 2007 UT 19 at ¶26. But defendant fails to acknowledge that the easement for view in Ivers clearly pertained to the state road whose reconstruction was alleged to have caused the loss of view. The land in Ivers was adjacent to the road in question. Id. at ¶4. Further, in Ivers the court followed Miya in describing the rights in question as being "easements appurtenant to the land of an abutting owner on a street." Ivers, 2007 UT 19 at ¶13.

Defendant errs in reading Ivers too broadly. The court did not separate the right to damages for a loss of view from its point of origin. The easement of view applies only to

the abutting road. It does not attach to other roads that may be close by. It did not attach to I-15 but only to 500 West, the street adjacent to Admiral Beverage's property.

II. UTAH DOES NOT RECOGNIZE DAMAGE CLAIMS FOR LOSS OF VISIBILITY

Even if Admiral Beverage were permitted to claim loss of view damages related to a roadway that did not abut its property (I-15), the district court's granting of UDOT's motions in limine was still correct. All of the excluded evidence included claims for damages based on a loss of visibility. R. 151-63, 495-98, 656-64, 727-35, 773. Defendant not only acknowledges this, but argues in its brief that it is impossible to segregate damages caused by a loss of view from those allegedly caused by a loss of visibility. Brief of Defendant at 5-6, 13-16.

But Utah does not recognize a claim for loss of visibility.

> Neither the legislature nor this court has recognized a protected property right in visibility of one's property from the roadway. As a result, the court of appeals concluded that Arby's was not entitled to present evidence of claimed damage to their property caused by a loss of visibility of the property. We agree. In Utah, landowners do not have a protected interest in the visibility of their property from an abutting road, even if part of their land has been taken in the process.
>
> In Utah State Road Commission v. Miya, we concluded that the "rights of access, light, and air are easements appurtenant to the land of an abutting owner on a street. We also concluded in Miya that "[a] property owner has no property right to a free and unrestricted flow of traffic past his premises, and any impairment or interference with this flow does not entitle the owner to compensation." Similarly, a property owner has no recognized property right to free and unrestricted visibility of his property by passing traffic, and an impairment of that visibility does not mandate compensation.
>
> The speculative nature of the damages sought in a claim for loss of visibility further supports this conclusion. As the court of appeals correctly noted, a claim for loss of visibility is essentially a claim for compensation

> for lost business profits. Article I, section 22 of the Utah Constitution simply does not create a protectable property interest in the mere hope of future sales from passing traffic.
>
> Because property owners have no protectable property interest in visibility, the trial court was correct in granting the motion in limine on this issue, and the court of appeals was correct in affirming.

Ivers, 2007 UT 19 at ¶¶12-15 (citations and footnote omitted) (emphasis added).

Admiral Beverage fails to cite any precedent that would have permitted the district court to allow defendant to seek damages for a claim that is not recognized by Utah law. The district court would have erred if it permitted evidence of alleged impairment of visibility to be submitted contrary to the Utah Supreme Court's decision in Ivers. Far from distinguishing between what damage was attributable to loss of view as opposed to loss of visibility, the excluded evidence expressly conflated the two. Brief of Defendant at 5-6, 13-16.

In an effort to circumvent Ivers, Admiral Beverage relies on State Road Comm'n v. Rohan, 487 P.2d 857 (Utah 1971) for the proposition that damages attributed to the purported loss of visibility can be awarded, as long as they are mixed with other alleged damages and not stated as a separate amount. This is a mischaracterization of Rohan. Rohan involved a claim for severance damages to the remaining property after one-fifth of the land had been condemned for the construction of a freeway. The court upheld a general award of damages based on an appraisal that included consideration of a reduction in the property's value due to the increase in noise that would be caused by the adjacent freeway being built. The plurality opinion in Rohan permitted the consideration

of noise damage even though it could not be raised as a separate claim of damage. Id. at 859.

Defendant claims that, like the noise addressed in Rohan, alleged damages for loss of visibility can be presented as long as they are mixed with other damage claims and not separately presented. But the two are not similar. Rohan cited to the prior law of Utah as to when an increase of noise can be considered a compensable damage claim. Id. at 858 n.4. One of the cases cited in this footnote is Twenty-Second Corp. of Church of Jesus Christ of Latter-Day Saints v. Oregon Shortline, 36 Utah 238, 103 P. 243 (1909). Oregon Shortline made it clear that increased amounts of noise suffered by a landowner could, in certain circumstances state a damage claim.

> It is true that, in addition to the foregoing cases, there are some in which the courts have held that noises and other interferences arising from the operation of railroad trains are proper elements of damage when they affect the use and enjoyment of property. Among this class of cases are those which relate to the condemnation of property for public purposes, including railroads, where all the property is not taken, but the property not taken is, nevertheless, affected, or where some easement appurtenant to the property not taken is interfered with so as to affect the salable or usable value thereof. In that class of cases noises and similar interferences which may affect the market value of the property not taken are ordinarily permitted to be shown, not as independent elements of damage, but as elements to be considered in connection with all other things which may depreciate the market value of the property interfered with but not taken.

103 P. at 249.

Utah law recognized noise as a damage to property, but limited recovery for it due to valid public policy considerations.

> If mere annoyances from noises give a right of action for damages, then every one who is annoyed must be permitted to sue for and recover damages to the extent to which he is affected. The question therefore, in each case, would depend upon the intensity of the noises and the extent of the annoyance.

Id.

Loss of visibility is not similar to a claim that a landowner's enjoyment of his property has been damaged by noise. While Utah law has recognized a limited right to recover for damage due to noise, it has never recognized an appurtenant easement of visibility. In Ivers the court held that "a property owner has no recognized property right to free and unrestricted visibility of his property by passing traffic." Ivers, 2007 UT 19 at ¶13. Defendant sought recovery for a diminution of the visibility of its property by the traveling public, even though the Utah Supreme Court expressly held that no such right existed.

In effect, the defendant landowner claims a vested right to view and be viewed by passing traffic. Whether it is couched in terms of a right to view or a right of visibility, a landowner cannot claim a vested right in passing traffic. Ivers, 2007 UT 19 at ¶¶13-15. Establishment and regulation of traffic movement is a function of state police powers, and the fact that I-15 may bring traffic near the property does not create a vested right. The government may direct the traffic elsewhere without a claim for loss of property rights. "[W]hat the police power may give an abutting property in the way of traffic on the highway it may take away . . . ." Hampton v. Rd. Comm'n, 21 Utah 2d 342, 445 P.2d

708, 711 (1968). The district court correctly excluded such evidence as being impermissible and that decision should be affirmed on appeal.

III. JUDGE FAUST DID NOT ABUSE HIS DISCRETION IN REFUSING TO REVISIT JUDGE ROTH'S PRIOR DECISION

Defendant correctly points out that a second judge presiding over an action is not always bound by the interlocutory decisions of the first judge.

> A court can consider several factors in determining the propriety of reconsidering a prior ruling. These may include, but are not limited to, when (1) the matter is presented in a "different light" or under "different circumstances;" (2) there has been a change in the governing law; (3) a party offers new evidence; (4) "manifest injustice" will result if the court does not reconsider the prior ruling; (5) a court needs to correct its own errors; or (6) an issue was inadequately briefed when first contemplated by the court.

Trembly v. Mrs. Fields Cookies, 884 P.2d 1306, 1311 (Utah App. 1994).

But showing that Judge Faust had the right to reconsider Judge Roth's decision is not enough. Defendant had the burden to show that Judge Faust abused his discretion in not doing so.

> While a case remains pending before the district court prior to any appeal, the parties are bound by the court's prior decision, but the court remains free to reconsider that decision. It may do so sua sponte or at the suggestion of one of the parties. And this discretionary power of reconsideration includes the right of the district court to decline to reopen a matter it has already decided. As long as the case has not been appealed and remanded, reconsideration of an issue before a final judgment is within the sound discretion of the district court.

IHC Health Serv. Inc. v. D & K Mgmt., Inc., 2008 UT 36, ¶27, 606 Utah Adv. Rep. 28 (footnotes omitted).

Defendant has failed to argue that Judge Faust abused his discretion. No such showing has been made. This Court should reject the defendant's law-of-the-case argument.

Even if defendant had made a proper abuse of discretion argument, it would still fail. Defendant asks this Court to reverse the district court for no reason other than Judge Faust adopted a prior decision made by Judge Roth. Admiral Beverage's argument fails for two reasons. First, it has failed to show that Judge Faust believed himself bound by Judge Roth's prior decision. Judge Faust did not say he was bound by the prior decision, but that he was adopting it. R. 862-63. That Judge Faust had the right to reconsider Judge Roth's decision does not mean he had a duty to do so.

Defendant's only argument is that Judge Roth's decision should have been rejected because it was made before the Utah Supreme Court issued its decision in Ivers. But, like Ivers, Judge Roth rejected the existence of a claim for loss of visibility. R. 495-98. His rationale is very similar to that adopted in Ivers. Admiral Beverage has failed to show how Judge Roth's decision on this issue was contrary to Ivers.

The issues before Judge Faust were: 1) can defendant claim damages for alleged loss of visibility; and, 2) can defendant claim damages loss of view concerning an obstruction that was not part of the abutting roadway. Judge Faust made his own ruling on the second issue. Judge Faust should not be reversed because he adopted Judge Roth's ruling on loss of visibility damages.

The second reason why Admiral Beverage's argument fails is because defendant cannot show that Judge Faust's decision was in error. As shown in the prior arguments, Judge Faust properly excluded the defendant's evidence. That decision should be affirmed on appeal.

CONCLUSION

For the above stated reasons, plaintiff asks this Court to affirm the district court's granting of UDOT's three motions in limine.

PLAINTIFF DOES NOT DESIRE ORAL ARGUMENT OR A PUBLISHED OPINION

Plaintiff-appellee does not request oral argument and a published opinion in this matter. The questions raised in this appeal are such that plaintiff believes oral argument will not be of assistance to the Court in reviewing and deciding this matter. Plaintiff does desire to participate in oral argument if such is held by the Court.

Respectfully submitted this 21st day of July, 2008.

BRENT A. BURNETT
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Attorney for Plaintiff/Appellee

CERTIFICATE OF SERVICE

I hereby certify that I mailed two true and exact copies of the foregoing Brief of Plaintiff/Appellee, postage prepaid, to the following on this 21st day of July, 2008:

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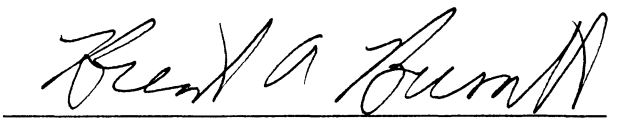

ADDENDUM "A"

THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

UTAH DEPARTMENT OF TRANSPORTATION,

Plaintiff,

vs.

ADMIRAL BEVERAGE CORPORATION (Assignee of Mark Investment Trust); PARK CITY WEST & ASSOCIATES; VALLEY BANK & TRUST COMPANY nka BANK ONE, UTAH; and VALLEY MORTGAGE COMPANY nka UTAH INVESTMENT COMPANY,

Defendants.

MEMORANDUM DECISION and ORDER (Cross-Motions in Limine)

CONSOLIDATED:
Case No. 970905361CD
Case No. 970905368CD

Judge Stephen L. Roth

UTAH DEPARTMENT OF TRANSPORTATION,

Plaintiff,

vs.

ADMIRAL BEVERAGE CORPORATION,

Defendant.

Plaintiff Utah Department of Transportation ("UDOT") filed a Motion in Limine to which defendant Admiral Beverage Corporation ("Admiral") responded with a cross-motion, Motion in Limine of Defendant Admiral Beverage Corporation to Admit Evidence of All Factors That Affect Fair Market Value ("Admiral's Motion in Limine"). While both motions are nominally focused on

the parties' competing views of the admissibility of basically the same evidence, they recognize that the real issue is the scope of severance damages that may be awarded to defendants under Utah condemnation law. The parties submitted memoranda supporting their own motions and opposing their opponents, as well as reply memoranda. The court heard argument on the motions on June 28, 2005, where UDOT was represented by Randy S. Hunter, Assistant Attorney General, and Admiral was represented by Rex E. Madsen (who argued) and Reed L. Martineau, Snow Christensen & Martineau. The court gave leave to Admiral to submit a new survey in response to one submitted by UDOT just before the hearing. That survey was provided to the court on August 31, 2005, and the matter was submitted for decision. Having considered the memoranda, affidavits and other evidence submitted, along with the arguments of counsel, the court GRANTS UDOT's Motion in Limine and DENIES Admiral's Motion in Limine, for the reasons set forth below.

DECISION

A. Factual Background.

The relevant facts do not appear to be disputed in any material way. Admiral owns two adjacent lots directly to the west of the I-15 freeway, bordering 500 West, which serves as a frontage road in that area, running north and south between the Admiral lots and the west side of the freeway. In connection with the I-15 reconstruction project, the west side of the freeway in that area was moved closer to the Admiral lots, requiring that the 500 West frontage road also be moved further to the west and onto the east side of Admiral's property, resulting in the condemnation of what are now identified by UDOT as parcels 109 and 110, which are the subject of these consolidated cases.

Before reconstruction, the existing freeway lanes had an elevation about two feet higher than the surface of Admiral's property. The reconstructed freeway is elevated considerably higher, with a portion of the freeway wall reaching a height of about 28 feet at a point about six inches outside and to the west of the southeast corner of parcel 109, the former southeast corner of the Admiral property, and about 62 feet from the nearest point of Admiral's property remaining after the condemnation.[1] While 500 West was reconstructed on the taken parcels, no part of the rebuilt freeway itself is located on that property.

Based on an appraisal, UDOT deposited into court a total of $163,100 as payment of just condemnation for the taking of parcels 109 and 110. Admiral appears to have only minimal disagreement that the deposited amount is a fair value for the property taken, as valued on a square-footage basis. The central issue is whether there are additional compensable severance damages to the remainder of Admiral's property. Based on the reports of its own expert appraisal witnesses, Admiral claims that the market value of the remaining property has been reduced by "(a) loss of air, light, view, visibility and aesthetics, and (b) increased fumes and dust from traffic traveling on the reconstructed I-15 freeway . . . ." Admiral's Memorandum in Support of its Motion in Limine to Admit Evidence of All Factors That Affect Fair Market Value and in Opposition to Plaintiff's

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[1] Admiral originally argued that a portion of the freeway wall at issue was actually built within the southeast corner of parcel 109, based on UDOT engineering drawings that appeared to support such a conclusion. About two weeks before the hearing, however, UDOT submitted, through the Affidavit of Keith Hafen, a more detailed survey that showed the wall, at its nearest point, to be six inches outside of the condemned parcel 109. Subsequent to the hearing, Admiral had its own survey done, which confirmed that the wall was outside of parcel 109, although four to five inches at its closest point rather than six, a difference that is not material to the issues before the court.

Motion in Limine ("Admiral's Memorandum in Support") at 2. UDOT contends that these rights are not compensable as severance damages under applicable law.

B. **Analysis**.

The factors identified by Admiral's appraisers as damaging the remaining property seem to fall into three categories: the loss of visibility and prominence of the remainder due to the size and location of the new freeway structures; loss of air and light to, and view from, the remaining property; and the increase in noise, dust, fumes and so on from increased traffic flow nearer to the remainder than the prior freeway. The claim for loss of visibility is the only subject addressed in UDOT's Motion in Limine, but all of these factors are addressed in Admiral's Motion in Limine, which is imposed *in toto* by UDOT. The loss of visibility issue is addressed separately as a matter of first impression in Utah.

1. Loss of Visibility.

There seems to be no dispute that reconstruction of the portion of I-15 passing by the Admiral property, which moved the freeway closer and significantly raised its grade, restricts the visibility of the remainder parcels from passing vehicles in comparison with the prior freeway configuration. The issue of whether reduced visibility is a compensable severance damage has not been directly addressed by Utah appellate courts. Nevertheless, the court believes that analogous Utah case law provides guidance in this area.

A long line of Utah cases has established the principle that the appurtenant rights of an owner of abutting property do not include an interest in the traffic flow from a public road or highway passing by his property that justifies severance damages if reduced or taken away. In *Hampton v. State Road Commission*, 445 P.2d 708 (Utah 1968), the court noted that "the right of ingress or

egress to or from one's property [does not] include any right in and to existing public traffic on the highway, or any right to have such traffic pass by one's abutting property." *Id.* at 711. The court explained:

> The reason is that all traffic on public highways is controlled by the police power of the State, and what the police power may give an abutting property owner in the way of traffic on the highway it may take away, and by any such diversion of traffic the State and any of its agencies are not liable for any decrease of property values by reason of such diversion of traffic, because such damages are "*damnum absque injuria*," or damage without legal injury.

Id. at 347. *See also*, *Weber Basin Water Conservancy District v. Hislop*, 362 P.2d 580, 581 (Utah 1961) ("The owner of land abutting on a street or highway has no property or other vested right in the flow of traffic on that street or highway and is not entitled to compensation when that flow of traffic is diminished as a result of eminent domain proceedings"); *Utah State Road Commission v. Miya*, 526 P.2d 926, 928 (Utah 1974) ("A property owner has no right to a free and unrestricted flow of traffic past his premises, and any impairment or interference with this flow does not entitle the owner to compensation."); *Utah Department of Transportation v. Harvey Real Estate*, 2002 UT 107, ¶14 (citing *Miya* and quoting *Hampton* for the principle stated above).

Here, a significant portion of Admiral's claimed severance is based on the reduction in visibility from the reconstructed freeway when compared to its original configuration. The visibility that was lost, under these circumstances, was necessarily a function of the passage of traffic. In other words, the original visibility of the site resulted from the construction of the freeway by the State, which exposed the Admiral property to the view of passing motorists who used the freeway as a route of travel. Under existing law, if the State had moved the freeway route horizontally, to a different location far enough from the Admiral property that it traffic no longer passed by it, the

deprivation of the passing traffic itself would not be a compensable injury. It is difficult to see how moving the freeway vertically, so that traffic continues to pass by the property but without being able to see it, results in an injury that is any different as a practical matter or that is legally distinctive in any meaningful way. The court therefore does not believe that diminishment of visibility from a road or highway is any more compensable as severance damages than a more general diversion of traffic flow would be.

Moreover, even if a right to visibility were found to be appurtenant to landowners abutting a highway or road, the rights of abutting owners with respect to a freeway are significantly more limited. I-15 is a "[l]imited-access facility," which is defined by statute as "a highway especially designated for through traffic, and over, from, or to which neither owners nor occupants of abutting lands nor any other persons have any right or easement, or have only a limited right or easement of access, light, air, or view." U.C.A. § 72-1-102 (11). This definition suggests, among other things, an intent to restrict the appurtenant rights of lands abutting freeways so as to limit the scope of severance damages attributable to such rights.

Admiral relies in part on *People v. Ricardi*, 144 P.2d 799 (Cal. 1944), and subsequent decisions following it, for the proposition that a landowner is entitled to severance damages for the loss of the view of his property from a highway. The California Court of Appeals, however, subsequently held that *Ricardi's* "right to a view" does not apply to freeways. The court upheld the lower court's conclusion that an owner "has no legal right to a view of his property from the freeway:"

> A freeway is unlike a highway. An abutter/landowner has a right to a view from a public road or highway. However, while the purpose of a highway is to provide landowners with abutter's rights, the purpose of a freeway is to eliminate those rights.

People ex rel. Department of Transportation v. Wilson, 31 Cal.Rptr.2d 52, 55 (Cal.App. 1994) (citation to *Ricardi* omitted). The court noted that the purpose of roads or highways is to allow access from abutting private property and to allow travelers along the road or highway "to view a business, drive into it, patronize it, and reenter the highway" but that "[s]uch purposes are antagonistic to the purpose of a freeway," which is designed to "'prevent just that sort of thing.'" *Id.* (citations omitted). The court went on to discuss a California statute similar in import to Utah's:

> For that reason, *Streets and Highway Code section 23.5* provides that owners of abutting lands to a freeway have limited or no right of access to or from their abutting lands. Obviously a freeway restricts rights of access and related rights such as the right to a view.

Id.

Therefore, even if the court were inclined to find a right to a view of one's abutting property from a road or highway under Utah law, the court concludes that a landowner "has no legal right to a view of his property from the freeway."

2. Other Damages.

Admiral also claims it is entitled to severance damages for "loss of air, light, view, visibility and aesthetics," a bundle of rights that may include, but goes beyond, the right to a view from the freeway, as well as for "increased fumes and dust from traffic traveling on the reconstructed I-15 freeway." The court concludes that Utah law does not allow recovery for such damages under the circumstances of these consolidated cases.

The claimed damages appear to arise either from the elevation of the grade of the freeway or from increased traffic due to the freeway improvements. Neither the construction of the elevated ramp or the reconstruction of the freeway itself, however, occurred on Admiral's property; the only

improvement constructed on Admiral's property was the relocation of the 500 West frontage road. Utah cases have been consistent in holding that severance damages are limited to those caused by the taking itself or attributable to improvements constructed on the taken property. The court in *Miya*, in finding compensable the loss of view from a remainder property caused by construction of a highway highway structure, noted that "the loss of view occasioned by a proposed public structure to be erected, *in part at least*, upon a parcel of property taken by condemnation from a unit" was a factor to be taken into account in determining severance damages. *Miya*, 526 P.2d at 929 (emphasis added).

This precept was emphasized in *Utah Dep't of Transportation v. D'Ambrosio*, 743 P.2d 1220 (Utah 1987), where the state took a private road to two residences, which it paved and made public in connection with a highway extension. The Court rejected the landowners' claim that they were entitled to severance damages from construction of the highway:

> The general rule is that damages attributable to the taking of others' property and the construction of improvements thereon are not compensable. Such damages suffered generally by all the property owners in the area are deemed consequential.
>
> Severance damages are those caused by the taking of a portion of the parcel of property where the taking or the construction of the improvement *on that part* causes injury to that portion of the parcel not taken.

Id. at 1221-22 (emphasis in the original).

The court reemphasized its *D'Ambrosio* holding in *Harvey Real Estate, supra*, an appeal of a trial court's grant of the state's motion in limine excluding certain severance damage evidence. In *Harvey*, the landowner sought severance damages for the diminution in value of its remainder property resulting from the closure of an intersection as part of a road project for which a portion of its land was taken. Similar to an argument Admiral makes here, the owner contended that the

intersection closure "was made possible only by the taking of Harvey's property . . . ." *Harvey*, 2002 UT 107, ¶12. Harvey asserted that limiting severance damages to only those resulting from improvements constructed at least in part on the portion of the property taken conflicted with the broad language of U.C.A. § 78-34-10(2), which provides for assessment of damages to a remainder from the taking of a portion of the property and from "the construction of the improvement in the manner proposed by the plaintiff [condemning authority]." The court disagreed:

> Section 78-34-10 gives a landowner the right to present evidence of damages caused by the construction of the improvement made on the severed property. It does not given the landowner the right to present evidence of damages caused by other facets of the construction project.
>
> * * *
>
> We held essentially the same in *Utah Department of Transportation v. D'Ambrosio*, 743 P.2d 1220, 1222 (Utah 1987), although we did not reference section 78-34-10(2). There we stated that "severance damages are those *caused by* the taking of a portion of the parcel of property where the taking *or the construction of the improvement on that part causes* injury to that portion of the property not taken." (Emphasis added.) Our holding today also accords with the well-established common law principle that severance damages "may be made for any diminution in the value of [an owner's non-condemned land], as long as those damages were *directly caused by the taking itself* and by the condemnor's use of the land taken." 26 Am.Jur. 2d *Eminent Domain* § 368 (1996) (emphasis added) . . . .

Id. at ¶¶ 10-11 (interpolations and emphasis in the original, some citations omitted).

The court therefore concludes that damages resulting from construction of the elevated ramp just outside the taken parcels, as well as damages from the reconfiguration of the freeway as part of the reconstruction project are not compensable as severance damages under Utah law. This appears to include evidence related to all of "the components of severance damages" that were "taken into account" by Admiral's expert appraisers and enumerated at paragraph 7 of the Affidavit of Robert

A. Steele and paragraph 7 of the Affidavit of John C. Brown (Exhibits A and B, respectively, to Admiral's Memorandum in Support), except for "loss of parking."[2]

ORDER

It is therefore ORDERED that UDOT's Motion in Limine is GRANTED, and Admiral's Motion in Limine to Admit Evidence of All Factors That Affect Fair Market Value is DENIED.

DATED this 31st day of October, 2005.

BY THE COURT:

Stephen L. Roth
DISTRICT JUDGE

[2] The facts of this case illustrate the sometimes arbitrary nature of the rule that the court has relied on in making its decision here. Without so finding, it is certainly possible that the court's decision would have been significantly different if the offending elevated freeway ramp had been built six inches within, rather than six inches outside, the condemned parcel 109. In this regard Admiral has advanced an argument that has special appeal given the harsh result the difference of a matter of inches may produce. That argument proposes that if a taking is part of an integrated project (which Admiral argues is the case here), the landowner should be entitled to compensation for damages resulting from specific improvements related to the purpose of the taking and causing specific injury to the remainder, even if they were not constructed within the immediate boundaries of the take. *See* Admiral Beverage Corporation's Reply Memorandum in Support of Its Motion in Limine . . ., at 6-10. This approach recognizes that the actual reduction in value of the remainder from the improvement, as a practical matter, may be no different when it is located just within or just outside of the taken parcel.

The court believes, however, that the repeated (and apparently unequivocal) holdings of the Utah Supreme Court, as addressed above, constrain it from seriously considering such an approach at this level, because it would involve a departure from current law. In this regard, the appellate courts are better equipped to identify, analyze and resolve the competing public and private interests, as well as the legal complications, that would be implicated in such a change in approach to severance damages. The resolution of these issues must therefore be left to some future appeal.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 970905361 by the method and on the date specified.

METHOD	NAME
Mail	RANDY S HUNTER ATTORNEY PLA 160 E 300 S 5TH FL POB 140857 SALT LAKE CITY, UT 84114-0857
Mail	REX E MADSEN ATTORNEY POB 45000 SALT LAKE CITY UT 84145
Mail	REED L MARTINEAU ATTORNEY 10 EXCHANGE PLACE 11TH FLR POB 45000 SALT LAKE CITY UT 84145-5000

Dated this 31st day of Oct, 2005.

Deputy Court Clerk

ADDENDUM "B"

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

UTAH DEPARTMENT OF TRANSPORTATION,	:	MINUTE ENTRY
Plaintiff,	:	CASE NO. 970905361 970905368
vs.	:	(Consolidated)
ADMIRAL BEVERAGE CORPORATION (ASSIGNEE OF MARK INVESTMENT COMPANY); PARK CITY WEST & ASSOCIATES; VALLEY BANK & TRUST COMPANY, nka BANK ONE, UTAH; VALLEY MORTGAGE COMPANY, nka UTAH INVESTMENT COMPANY,	:	
Defendants.	:	
UTAH DEPARTMENT OF TRANSPORTATION,	:	
Plaintiff,	:	
vs.	:	
ADMIRAL BEVERAGE CORPORATION,	:	
Defendant.		

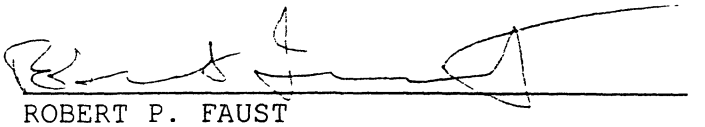
UDOT's Motions in Limine on the issue of view and visibility and concerning Jerry R. Weber's testimony on the subject of severance damages caused by loss of view and visibility was heard by the Court on December 18, 2007, at 10:00 a.m. After hearing arguments thereon, review of the pleadings and a specific review of the Decision dated October 31st, 2005 issued by Judge Roth in this case, the Court grants UDOT's Motions in Limine. The Court also refers the parties to Judge Roth's decision and

adopts the same here.

Defendant is able to assert claims for any severance damages relating to abutment rights pertaining to being an adjoining landowner to 500 West.

This Minute Entry decision will stand as the Order of the Court.

Dated this 24th day of December, 2007.



ROBERT P. FAUST
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 27 day of December, 2007:

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Michelle Barney

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

UTAH DEPARTMENT OF TRANSPORTATION,	:	MINUTE ENTRY
Plaintiff,	:	CASE NO. 970905361 970905368
vs.	:	(Consolidated)
ADMIRAL BEVERAGE CORPORATION (ASSIGNEE OF MARK INVESTMENT COMPANY); PARK CITY WEST & ASSOCIATES; VALLEY BANK & TRUST COMPANY, nka BANK ONE, UTAH; VALLEY MORTGAGE COMPANY, nka UTAH INVESTMENT COMPANY,	:	
Defendants.	:	
UTAH DEPARTMENT OF TRANSPORTATION,	:	
Plaintiff,	:	
vs.	:	
ADMIRAL BEVERAGE CORPORATION,	:	
Defendant.	:	

UDOT's Motion in Limine on the issue of view and visibility (concerning Jerry R. Weber's testimony on the subject of severance damages caused by loss of view and visibility) was heard by the Court on December 18, 2007, at 10:00 a.m. After hearing arguments thereon, review of the pleadings and a specific review of the Decision dated October 31,

2005 issued by Judge Roth in this case, the Court grants UDOT's Motion in Limine. The Court refers the parties to Judge Roth's decision and adopts the same here.

Defendant is able to assert claims for any severance damages relating to abutment rights pertaining to being an adjoining landowner to 500 West.

This Minute Entry decision will stand as the Order of the Court.

Dated this 24th day of December, 2007.

ROBERT P. FAUST
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 3rd day of ~~December~~ Jan., 2008:

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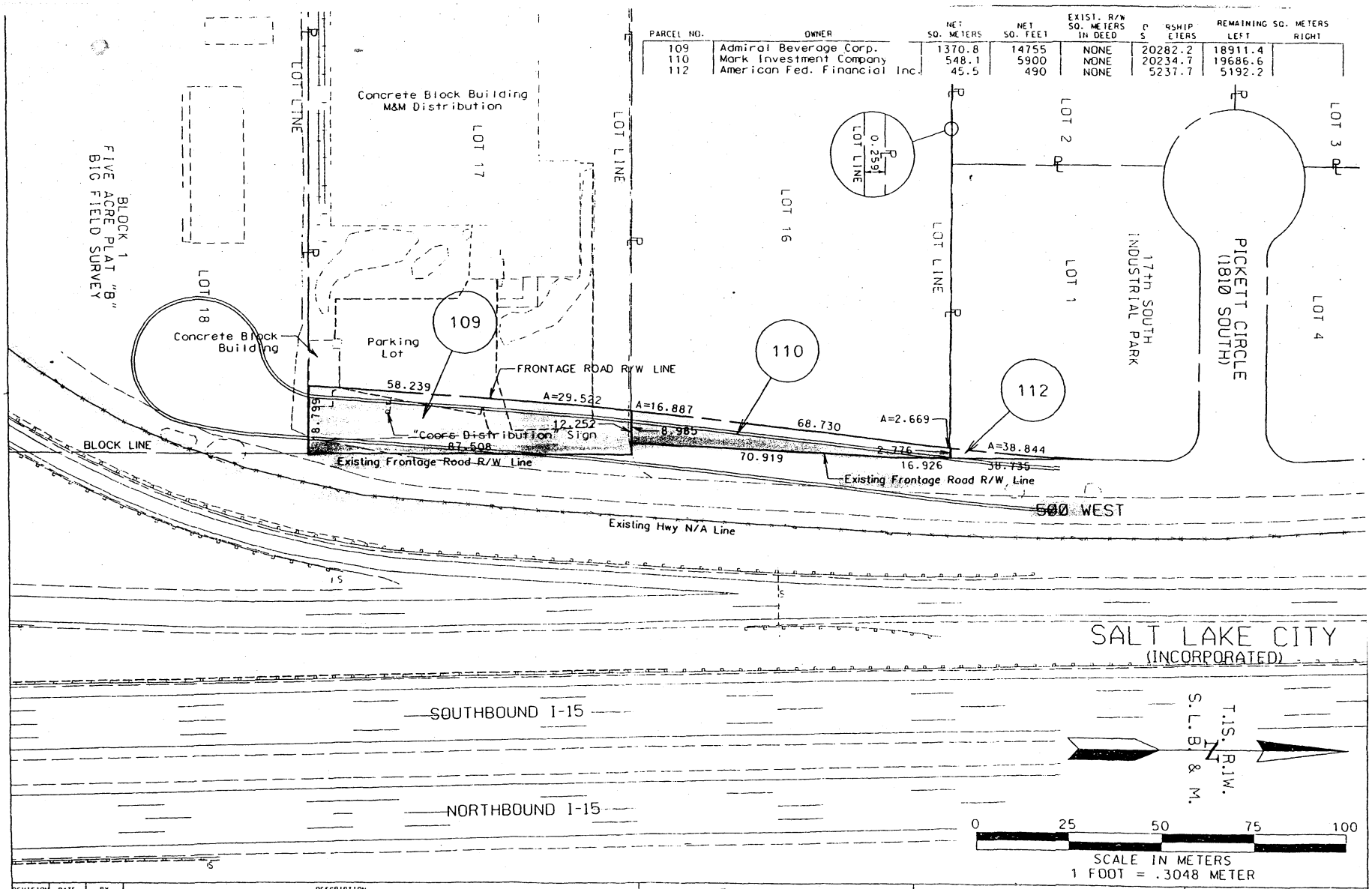
ADDENDUM “C”



REVISION	DATE	BY	DESCRIPTION
1	2/24/97	KRH	REVISED PARCELS 109, 110 & 112

UTAH DEPARTMENT OF TRANSPORTATION

DRAWN BY: BKH CHECKED BY: KRH

LOCATION : 1900 SOUTH 500 WEST

ESI ENGINEERING
3500 SOUTH MAIN, SUITE 206
SALT LAKE CITY, UT 84115
(801)263-1752, (801)263-1780 FAX

I-15 TAKINGS
10600 SOUTH TO 500 NORTH
RIGHT OF WAY PLAN SHEET

PROJECT No.: SP-15-7(116)304

DATE : 29 MAY 1996
COUNTY : SALT LAKE

TEMP SHEET: 13